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SUPREME COURT OF THE UNITED STATES

HAROLD B. WILLEY,

OCTOBER TERM, 1953

No. 352

JULIA THOMPSON,

Petitioner,

vs.

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER OF THE
UNITED STATES BUREAU OF EMPLOYEES' COMPENSATION,
SIXTH COMPENSATION DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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UNITED STATES BUREAU OF EMPLOYEES' COMPENSATION,
SIXTH COMPENSATION DISTRICT, AND GULF FLORIDA
TERMINAL INC. AND AMERICAN MUTUAL LIA-
BILITY INSURANCE COMPANY**

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported in 205 F. (2d) 527 and is set forth at page 23 of the Record. The District Court filed no opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). Certiorari was granted on January 4, 1954.

Questions Presented

1. Whether a bigamous marital relation by a wife while living apart from her husband by reason of his desertion bars her from recovery of death benefits provided by the Longshoremen's and Harbor Worker's Compensation Act.
2. Whether, in determining the eligibility of a wife for benefits under the Act, the Bureau of Employees' Compensation or the Court of Appeals could give weight to the wife's intention not to resume the relationship of husband and wife with the deceased employee, after the husband's desertion and in the context of his prolonged adulterous relationship which continued up to the time of his death.

Statute Involved

The Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 902 (16) provides at Section 2 (16) that:

“The term ‘widow’ includes only the decedent's wife living with or dependent for support upon him at time of his death; or living apart for justifiable cause or by reason of his desertion at such time.”

Statement

Otis Thompson, a gang header on a vessel at Tampa, Florida, died as a result of injuries sustained through his employment on June 15, 1951. His employment was covered by the Longshoremen's and Harbor Workers' Compensation Act (R. 7).

Thompson had married Julia Thompson on January 15,

1921. Two children were born, and Otis and Julia Thompson lived together until 1925. In that year, Otis Thompson began an adulterous relationship with Sallie Williams. In November, he deserted his wife, the present petitioner. Thereafter, Otis Thompson never lived with his wife and contributed nothing to her support or for that of their children. Their marriage, however, was never terminated by divorce (R. 8).

In 1926, Otis Thompson began to live with Sallie Williams as man and wife. In 1929, he celebrated the relationship with a marriage ceremony. In 1949, Sallie Williams left Otis Thompson, but she continued to visit with him up to the date of his death (R. 9, 10).

Julia Thompson, for her part, went through a marriage ceremony with Jimmy Lewis Fuller in 1940. Her bigamous marital relation continued until 1949, when Fuller obtained a divorce upon grounds of desertion (R. 8, 9).

Three weeks before Otis Thompson received his fatal injuries, he visited Julia Thompson and asked if she would "take him back". She refused (R. 10).

After the death of Otis Thompson, petitioner filed a claim with the Bureau of Employees' Compensation of the United States Department of Labor for the death benefit due the widow of a deceased employee covered by the Longshoremen's and Harbor Workers' Compensation Act.

The respondent Deputy Commissioner of the Bureau, upon the basis of the facts recited above, entered as additional findings of fact that the petitioner did not have any intention resuming the relationship of husband and wife with the decedent; that at the time of his injury and death, the petitioner was the lawful wife of Otis Thompson; that from November, 1925 until June, 1940, the petitioner was living apart from her husband by reason of his desertion; that she was not living apart from him at the time of his death for justifiable cause or by reason of his desertion;

that she was not dependent upon her husband for support; and that she is not entitled to receive compensation for her husband's death (R. 10).

Upon the foregoing findings, the respondent, Deputy Commissioner, rejected the petitioner's claim for the reason, pertinent here, "That she was not living apart from Otis Thompson for justifiable cause or by reason of his desertion at the time of his death" (R. 11).

Petitioner then filed her Complaint in the United States District Court for the Southern District of Florida for a mandatory injunction to set aside the order rejecting the claim for death benefit. The respondents filed a motion to dismiss upon the grounds that the plaintiff below failed to state a claim upon which relief could be granted, and that it affirmatively appeared from the findings of fact in the compensation order that the order rejecting the claim of Julia Thompson for compensation was correct as a matter of law. The court below granted the motion to dismiss (R. 1, 13, 15-16).

An appeal was taken from the Order Dismissing the Bill of Complaint to the Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the judgment, although in its opinion it conceded that the Second, Third and Ninth Circuits have each reached an opposite rule of law, albeit upon "a completely false premise" (17, 22, 24).

Review of Previous Decisions

Following the enactment of the Longshoremen's and Harbor Workers' Compensation Act in 1927, the Bureau of Employees' Compensation uniformly ruled, until the instant case, that a bigamous marriage by the wife of a deceased employee while living apart from her husband for justifiable cause or by reason of his desertion, did not bar her from death benefits under the Act.

The rulings of the Bureau have been contested five times.* In three of the contests, the award of the Deputy Commissioner to the surviving wife was upheld. *Traveler's Insurance Co. v. Norton*, 34 F. Supp. 740 (1940), (E. D. Pennsylvania; *Associated Operating Co. v. Lowe*, 52 F. Supp. 550 (1943), affirmed 138 F. 2d 916 (1943) (C. A. 2); and *Moore Dry Dock Co. et al. v. Pillsbury*, 169 F. 2d 988 (1948) (C. A. 9). In the Fifth Circuit, however, awards by the Deputy Commissioner to such widows were twice set aside, each time upon the ground that the subsequent bigamous marriage terminated the period of separation for justifiable cause and constituted a new and independent reason for living apart from the husband; and as a matter of law operated to forfeit any rights of the wife under the Act. See: *Ryan Stevedoring Co. v. Henderson*, 138 F. 2d 348 (1943), and *American Mutual Liability Insurance Co. v. Henderson*, 141 F. 2d 813 (1944).

Having been thus reversed and twice instructed in the Fifth Circuit's view of the law, the Deputy Commissioners in the Sixth Compensation District departed here from the established practice of the Bureau of Employees' Compensation in other Districts to deny the petitioner an award under the Act. Hence the action below for mandatory injunction by the petitioner.

Summary of Argument

Petitioner's right to recover compensation for the death of her husband under the Act turns upon a showing that she was living apart from her husband by reason of his desertion at the time of his death.

* After the decision of the Deputy Commissioner was rendered in the present case * * * on May 23, 1952. The Fifth Circuit again reversed the award of the Commissioner in *Henderson v. Avondale Marine Ways, Inc.*, 204 F. 2d 178 (Decided May 1, 1953) upon the authority of its earlier decisions.

Petitioner made the necessary showing. Her husband deserted her in 1925. His desertion was never terminated, regardless whether the desertion is determined solely upon a factual basis or upon the legal sense of the term. Inasmuch as the desertion was the continuing cause for the petitioner's life apart from her husband, it was the reason for such life apart at the time of his death.

The Court of Appeals departed from the express language of the statute in holding that the wife's bigamous marriage barred her right of recovery. Its doctrine that the bigamous marriage became an intervening cause for the life apart is not warranted by either a factual or legal analysis of the chain of causation. It was resorted to admittedly to give effect to what the Court conceived to be the "spirit and purpose of the Act".

As a principle of statutory interpretation, the Court was in error in invoking the purpose of the act to justify narrow construction in order to deny an award. In any event, the Court's understanding of the act's purpose was mistaken. An analysis of its legislative history and the statutes in *pari materia* indicates that there was no Congressional purpose to limit compensation only to dependents of covered employees. The Court of Appeals incorrectly read such a purpose into the act and upon that primary ground denied recovery to the petitioner.

The alternative ground used by the Court below to bar the petitioner's recovery is obviously a makeweight. It was not founded on the findings of facts, for there is no showing that the Deputy Commissioner based his decision on the wife's refusal to return to her husband in 1951, nor do the findings justify a conclusion that the husband *endeavored* to seek the return of his wife. Nor was the Court's ruling based upon a proper application of the law with respect to desertion. The Court was required to determine

the existence of desertion in accordance with its legal criteria. Those standards bar reliance upon an offer of reconciliation, made after the consummation of the desertion or made by a guilty party whose misconduct has not ceased, as a means of terminating the desertion. Thus the petitioner's status as a wife living apart by reason of her husband's desertion remained unaffected by her refusal to resume marital relations with her husband.

For these reasons, it is urged that the decision below should be reversed.

ARGUMENT

POINT I

A SUBSEQUENT BIGAMOUS MARITAL RELATION BY A WIFE LIVING APART FROM HER HUSBAND FOR JUSTIFIABLE CAUSE OR BY REASON OF HIS DESERTION DOES NOT BAR HER FROM RECOVERY OF DEATH BENEFITS UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

(A) The Court went beyond the express language of the statute.

It is conceded on the basis of the record that the petitioner was deserted by her husband and that for a period of 15 years she was living apart from him by reason of his desertion. Without the intervention of the petitioner's bigamous marriage, then, the petitioner would have met without challenge from the Court below¹, the statutory requirements for the recovery of death benefits².

The petitioner's relief was denied upon the Court's conclusion that a wife is not living apart from her husband at the time of his death by reason of his desertion or for justi-

¹ The question of the offer of reconciliation is discussed below.

² It is conceded that the petitioner, as the "surviving wife" under Section 9(b) of the Act, 33 U. S. C. 909(b) must qualify as widow under 9(h).

fiable cause "if she has made a new life for herself by living with another man as his wife." (R. 26).

If the Court had warrant for this rule, it must necessarily be found in the statute.

Of the four Circuits which have examined the provisions of the Statute in question here, only the Fifth Circuit has found any language to support its rule.

In the *Moore Drydock Company* case, *supra*, the Ninth Circuit reviewed the statute and came to the conclusion that:

"The Act does not provide that an employee's widow who, while married to such employee, went through a marriage ceremony with another man and thereafter lived with and was supported by him shall not be entitled to a death benefit. Such a provision should not be read into the Act by judicial construction." (Pages 990-991)

In the *Associated Operating Company* case, *supra*, the Second Circuit affirmed per curiam, the decision of the District Court which was equally emphatic: ". . . the law in question," the Court said at one point ". . . does not provide for inquiry, after abandonment, into the wife's subsequent life and conduct", and at another point: "I can find no authority for adding to the Statute provisions which are not even by fair inference to be found in it." (Page 553).

So too was the finding of the District Court in the *Traveler's* case, *supra*. There the Court was urged to bar the claim of the widow upon the grounds relied upon below and was cited a decision³ under the Illinois Workmen's Compensation Law, which limited benefits to a widow whom the deceased employee was "under legal obligations to support at the time of his injury."

³ *Polakow Corp. v. Industrial Commission*, 336 Ill. 395, 168 N.E. 271.

"The desirability of such a statutory provision may readily be conceded. Nevertheless, had Congress intended that such a rule govern awards of compensation under the Longshoremen's and Harbor Worker's Compensation Act, it could have stated so explicitly. To read such a provision into an unambiguous statute would exceed the proper bounds of the judicial function."

Indeed, it is not clear whether the Fifth Circuit has based its rule upon the express language of the statute, or, by means of a construction of the provisions of the act, upon its view of the legislative purpose. In its original decision on the question in *Ryan v. Henderson, supra*, the Court, without analyzing the issues implicit in its opinion, based the rule upon the "spirit and purpose of the Act". It said:

"The evidence clearly shows that the orginal separation was for justifiable cause and that such cause continued for a long time after the separation. We think, however, it cannot be said that at the time of (the husband's) death (the wife) was then living apart for justifiable cause, for there had intervened (her) bigamous marriage . . . The bigamous marriage brought an end to the period of separation for justifiable cause and (the widow) thereby forfeited any rights she had to recover benefits in the event of her lawful husband's death. *Any other holding would do violence to the spirit and purpose of the Act.*" (Italics supplied). (At Page 349).

In its second decision on the issue in *American Mutual Liability Insurance Co. v. Henderson, supra*, the Court confined its explanation to the simple statement that the wife's subsequent bigamous marriage "was in derogation of her relationship as the lawful wife" of (the decedent) and became the independent cause of her living apart from her husband at the time of his death." (Page 814).

In the opinion below, however, its third decision on the question, the Fifth Circuit referred to:

"... the precise terms of the statute which requires for recovery that 'at the time of his death', the woman claiming as 'widow' either be *living with* or dependent for support upon her husband, or, if she is *living apart from him*, that she is doing so for *justifiable cause* or by reason of his *desertion at that time*." (R. 25).

If the Court relied upon the words of the statute, without more, it could not have concluded that the petitioner failed to meet the requirements of the Act.

For whether the desertion be regarded as a question of fact, (Respondents' Brief in Opposition, Page 10, Par. 2) or in its legal significance, (*Behrend v. Weeks*, 77 App. D. C. 341, 135 F. 2d 258 (1943)), the husband's desertion of the petitioner inescapably was the originating cause for her abandonment and for her life apart and, as such, lost none of its causal qualities from the date of the desertion until the date of her husband's death.

The Fifth Circuit reached its result only by resorting to a doctrine of "intervening cause" by which it sought to negate the continuum of the desertion. It is a concept which, if it has place in domestic relations jurisprudence concerned with equities *inter se* and moral judgments, has no role whatsoever in the field of workman's compensation. Needless to say, the wife's eligibility for compensation is not to be measured against her ability to obtain a divorce. Neither the statute gives authority nor do the favored principles of statutory construction of compensation laws endorse such a concept. *Associated Operating Co. v. Lowe, supra*; *In the Matter of Rose Munoz*, Employees' Compensation Appeals Board, Federal Security Agency, Docket No. 48-114.

It is true that in its opinion below, the Court disavowed

its reliance upon the fact of the "immoral life" of the wife. However, in the *Ryan* decision, *supra*, the Court cited as authority in preference to the *Traveler's Insurance Company* case, *supra*, a Maine decision which expressly relied upon the spouse's ability to obtain a divorce as a criterion for eligibility for workmen's compensation. *Scott's* case, 117 Me. 436, 104 A. 794. Moreover, in *American v. Henderson*, *supra*, the Court gave explicit cognizance to the principles of divorce law by describing the bigamous marriage as a derogation of the marital relationship. Whether all of the vestiges of that reasoning have disappeared from the judicial thinking below is, of course, a matter of conjecture.

Apart from the doctrine of "intervening cause", implicit in the opinion below is the concept of dependency. The reference in the *Ryan* decision to the "spirit and purpose of the Act" and the emphasis in the present opinion on the wife's making a "new life", suggest that the Court was concerned with the absence of a *familial nexus* and with the wife's severance of any emotional and economic dependence upon her deserting husband. As the Court said of the *Moore Dry Dock* case, *supra*, ". . . by showing that she had set up a new marital establishment on a permanent basis . . . it would show . . . that she was not the widow of the deceased but another man's wife". (R. 26).

The act, of course, does not limit the recovery of compensation to a showing of dependency. To the extent that the Court below based its decision upon the view that the spirit and purpose of the statute require a showing of dependency, it is in manifest error.

(B) A review of the legislative history of the act together with a consideration of the statutes in *pari materia* indicate that the authority for the ruling below cannot be bottomed upon the "purpose and the spirit of the act".

If an unambiguous statute needs aids for its construction, (*Gemsco Inc. v. Walling*, 324 U. S. 244, 89 L. ed. 921, 933, 65 S. Ct. 605, (1945)) the Court below can derive little support for its rule from either the legislative history of the Longshoremen's and Harbor Worker's Act or from a review of the statutes in *pari materia*.

The present act followed two previous attempts by the Congress to legislate in the field of workmen's compensation for maritime workers. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 64 L. ed. 834; and *Washington v. Dawson & Co.* 264 U. S. 219; 68 L. ed. 646. The fate of its previous legislation before this Court led the Congress to the enactment of uniform and a general statute covering maritime employees engaged as harbor workers and longshoremen. In drafting the legislation, the responsible Congressional Committees made a comparative analysis of all of the workmen's compensation acts then in effect. See: *Hearings, Committee on the Judiciary, House of Representatives*, 69th Congress, 1st Session, on H. R. 9498, "To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Establishments"; 2nd Session on H. R. 12063; *Hearings, Senate Committee on the Judiciary*, 69th Congress, 1st Session, on S. 3170, "Compensation for Employees in Certain Maritime Establishments".

The statute which was ultimately adopted was intended to embody the more liberal features of all of the compensation acts. *Senate Hearings*, Page 37; *House Hearings*, H. R. 9498, Page 26-28, H. R. 12063 p. 2. Neither the congressional hearings and reports nor the congressional debate disclose any information regarding the definition of "widow" under the Statute. *H. Report 1767, S. Report 973*, 69th Congress.

However, the Congress had before it a variety of statutory

widows from which to make its choice. The pattern of virtually of all of the state workmen's compensation legislation based the widow's eligibility for benefits upon (1) relationship alone, and/or (2) dependency. Thus, the New York statute, upon which the Congress modelled most of the other provisions of the Longshoremen's and Harbor Worker's Compensation Act, makes the wife's relationship the sole requirement for recovery.⁴ The Massachusetts Act, on the other hand, incorporates within the law a built-in dependency clause⁵. Other states have limited the conclusive presumption of dependency to wives who are living with their husbands and have made the question of dependency for wives who are living apart solely one of fact.⁶

The Congress, as a reading of the act reveals, chose none

⁴ Chapter 816 of the Laws of New York as Amended and reenacted by Chapter 41 of the Laws of 1914, constituting Section 16 (2), Chapter 67, Consolidated Laws of New York as Amended. The New York Law is followed in this respect by Alaska, New Jersey, Oklahoma. See Schneider, Workmen's Compensation Laws.

⁵ The Massachusetts Act first defines "dependents" to be "members of the employee's family or next of kin who are wholly or partially dependent" upon the employee and then, it provides for a conclusive presumption with respect to certain persons. Chapter 152, Section 32, Annotated Laws of Massachusetts:

Dependents—The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: (a) A wife upon a husband with whom she lives at the time of his death, or from whom, at the time of his death, the department shall find the wife was living apart for justifiable cause or because he had deserted her. The findings of the department upon the questions of such justifiable cause and desertion shall be final."

The Massachusetts pattern, with variations, is followed by Alabama, Arizona, Georgia, Kentucky, Louisiana, Maine, Nebraska, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah. Schneider, Workmen's Compensation Laws, *supra*.

California, Illinois and Indiana depart from the Massachusetts pattern in that the conclusive presumption runs only to wives whom the husband is under a "legal obligation to support." Schneider, Workmen's Compensation Laws, *supra*.

⁶ Ohio, New Mexico. Schneider, Workmen's Compensation Laws, *supra*

of these patterns. It rejected relationship alone as a basis for the wife's eligibility. Nor was dependency made the sole criteria, except for payment of compensation to a "dependent husband."⁷ Reliance upon any conclusive presumptions to establish dependency was avoided, whether based on a "legal obligation to support", or upon a showing of "desertion by the husband or a life apart for justifiable cause".

Thus, although dependency may be invoked in favor of a liberal construction of the statute to uphold an award (*Baltimore & P. S. B. v. Norton*, 284 U. S. 408, 414, 76 L. ed. 366, 370, 52 S. Ct. 187 (1932)), the absence of dependency may not be invoked to support a narrowing of the statute to forbid an award.

In addition to the fund of definitions of "widow" and "surviving wife" available in the state compensation laws, the Congress was able to draw upon its own supply in the various federal compensation laws. During the very session in which the Longshoremen's and Harbor Workers Compensation Act was enacted, the Congress amended the Federal Employees' Compensation Act, 39 Stat. 742, 5 U. S. C. 751 et seq., in order to extend the statutory criterion of widowhood beyond that of dependency to include widows "living apart for reasonable cause or by reason of his desertion"⁸. Congress has relied on other definitions for other purposes. Thus, under National Service Life Insurance Act, 38 U. S. C. 802 (g) 56 Stat. 159, and the Social Security Act, 64 Stat. 511, 42 U. S. C. Suppl. V, 416 (h), relationship alone is the test of being a widow, and its determination is made in accordance with the law of the state. See: *Castor v. United States*, 174 F. 2d, 481 (6th

⁷ Section 9 (b), 33 U. S. C. 909 (b).

⁸ See C. 110, 44 Stat. 1086, and Senate Report No. 1324, 69th Congress, Second Session.

Cir.); and *Kandelin v. Social Security Board*, 136 F. 2d 327 (2nd Cir.). In the Civil Service Retirement Act, 5 U. S. C. Supp. IV, 724 (4)(d)(1) 46 Stat. 468, as amended by 62 Stat. 55, however, the Congress limited the term "widow" to a surviving wife of an individual who either "(A) shall have been married to such individual for at least two years immediately preceding his death, or (B) is the mother of issue by such marriage".

In the various veterans' pension acts, the Congress chose still other standards. The statutes originally provided *inter alia* that "No pension under any law of the United States shall be granted, allowed, or paid to the widow . . . unless such wife shall have lived and cohabited with (the veteran) continuously from the date of the marriage to the date of his death." 22 Stat. 373; 38 U. S. C. 192. Subsequently, the pension acts relaxed the requisite for continuous cohabitation in cases in which there was a separation which was due to the misconduct of or procured by the veteran without fault of the widow." See *World War Veteran's Act of 1924*, as amended 52 Stat. 353, 38 U. S. C. 505a. However, the Congress has made misconduct on the part of the widow an absolute bar to her right to receive pensions, by providing that ". . . the open and notorious adulterous cohabitation of a widow who is a pensioner shall operate to terminate her pension from the commencement of such cohabitation." 22 Stat. 345, 38 U. S. 199.

A review of the statutes in *pari materia* clearly indicates that the Congress applied, when it chose to do so, the standards it favored for the payment of various forms of compensation. It is axiomatic, therefore, that the Congress having chosen in the present act to apply no requirement of dependency, factual or legal, or, (if it be relevant), of morality, it cannot be deemed by the judiciary to have in-

tended such criteria. For this reason, apart from the necessity of following the express language of the statute, the reliance of the Fifth Circuit upon what it conceived to be the "spirit and purpose of the Act" was erroneous.

POINT TWO

THE COURT BELOW WAS IN ERROR IN REJECTING AN AWARD TO THE PETITIONER UPON THE GROUND THAT THE DECEDENT HAD ENDEAVORED TO HAVE THE PLAINTIFF RETURN TO HIM AND SHE HAD REFUSED TO DO SO.

(A) The Court below went beyond the findings of the Deputy Commissioner in order to reach the conclusion that the decedent *endeavored* to have his wife return to him.

An examination of the findings of fact entered by the Deputy Commissioner indicates that the denial of the petitioner's claim for compensation was in no way based upon her refusal to resume a marriage relation with her husband. The record shows that in his findings, the Deputy Commissioner adopted the date of the petitioner's bigamous marriage ceremony in 1940 as the terminal date of her separation from her husband for justifiable cause or by reason of his desertion. Thus the conversation between the petitioner and her husband in 1951, her refusal to resume the relationship of husband and wife, and the absence of any intent to resume the relationship in 1951 are all immaterial to the conclusion of the Deputy Commissioner that the petitioner was not living apart for justifiable cause or by reason of desertion at the time of the decedent's death. The immateriality of the 1951 occurrences to the Deputy Commissioner's findings is demonstrated by the absence of any findings (1) with respect to the effect of the termination of the wife's bigamous marital relation in August, 1949, (2) that from the terminal date of the wife's bigamous

marriage to the date of the husband's inquiry, the wife was living apart from her husband for justifiable cause or by reason of his desertion (in view of the admitted continuation of the relationship between the husband and his bigamous "wife"); and (3) that the wife's refusal to resume marital relations with her husband terminated such life apart for justifiable cause or by reason of her husband's desertion.

The Court below was, of course, bound by the findings of fact as they were made by the Deputy Commissioner. (*Marshall v. Pletz*, 317 U. S. 383, 388, 87 L. Ed. 348, 352-3. Inasmuch as the alternative ground upon which the Court relied was not derived from the Deputy Commissioner's findings, the Court below committed error in so basing its decision.

Assuming arguendo, that the Court of Appeals has the authority to make what are in effect its own findings, the statement, qua findings, in the decision that the decedent "endeavored" to have the plaintiff is not supported on the record. The findings of fact, which recited in some detail the history of the marital relations of the petitioner and the decedent with others as well as with each other indicate that prior to his desertion the husband had committed adultery with Sallie Williams, that following his desertion he lived with Sallie Williams until 1949, and that from 1949 until his death Sallie returned to visit with the husband two or three times. It was in this context that it was found that the husband on a sole occasion during the entire period, three weeks prior to the date of his injury, "asked Julia Thompson if she 'would take him back' and Julia Thompson refused". To term as an "endeavor" this single query by the husband, phrased in the subjunctive and posed in the context of a long desertion and a prolonged marital infidelity (which even at that moment did not ap-

pear to have been terminated), is so exaggerated as to be without any foundation on the record.

If, as a simple issue of fact, the husband's conduct did not constitute an endeavor to seek the return of his wife, there is, of course, no basis for the alternative ground of the decision below.

(B) The Court of Appeals as a matter of law could give no weight to the husband's query to his wife, the wife's refusal to resume the marital relation, or the absence of an intent by the wife to live with her husband again.

Even were there a factual basis for the Fifth Circuit's conclusion, there is posed the question of law, here as in the effect of the wife's bigamous marriage, whether under the statute the Court can enquire into the spouse's conduct after the husband's desertion. The question as to both elements of conduct is whether subsequent acts of the wife, or of the husband, can *intervene* after the husband's desertion to alter the wife's status as one living apart by reason of the desertion. The subsequent acts might be a bigamous marriage, other acts of immorality, a refusal by the wife to return to her husband, or as here, a negative answer to a question whether she would return. For the reasons discussed earlier, it is submitted that once the desertion has been established, no subsequent conduct can be invoked as a bar to the wife's recovery of compensation.

In the consideration of the effect of the wife's subsequent bigamous marriage upon her status as a wife living apart by reason of desertion, the petitioner did not discuss whether the term, *desertion*, in the statute connotes its meaning in law or in fact. In the petitioner's view of the statute, as we have stated, either rule precludes the Court from holding that the bigamous marriage negated the effect of the husband's desertion as the reason for the petitioner's life apart at the time of his death.

Petitioner concedes that this is not so with respect to

the husband's endeavor, if it be endeavor, to resume a marriage relation with his wife. Implicit in petitioner's analysis is the concept that while the elements of desertion must be proved as facts, the criteria of desertion must be determined from its legal significance.⁹ If this be so, then by any legal standard, the wife is under no obligation to accept an offer of reconciliation after the husband's desertion has been consummated.

The petitioner recedes from the position stated in her Petition for Writ of Certiorari that the Court of Appeals must adhere to Florida's law with respect to desertion. But she submits that the rule stated in *Wright v. Wright*, 87 So. 156 (1921) is adhered to by every jurisdiction¹⁰, and that because of its universality it is encompassed within the guides for the determination of desertion:

"Whatever may be the duty of either spouse during the period when the cause of action on the ground of desertion is incubating, there is no obligation upon the part of either, after the desertion has been wilful, obstinate, and continued for the period of a year, to resume the martial relations."

In that action an offer of reconciliation came twenty months after the desertion and eight months after the cause of action accrued. The Court said:

⁹ See *Behrend v. Weeks, supra*, at P. 258:

"The term 'justifiable cause' is familiar in connection with divorce and separation. It is substantially equivalent to 'a matrimonial offense'. We think Congress used the term in its legal sense." *Newman's Case*, 222 Mass. 563, 111 N.E. 359. This decision goes beyond *Behrend* and requires a showing of eligibility for divorce. *Brougher v. Mowrey Grain Co.* (R.I. 1938), 200 A. 773, which is sometimes cited as *contra*, does not deprive the terms of a legal meaning, but holds merely that the words are not to be tested against a petition for divorce. "Whether or not such living apart for reasons not amounting to a defense to a petition for divorce constitutes in any given case a justifiable cause is a question of law and fact. . . ." (Emphasis supplied).

¹⁰ 27 *Corpus Juris Secundum* 576 et seq.

"... (the offer) came too late, as the desertion had been obstinate, wilful, and continued for a year, and after such a desertion the injured party is within his rights if he declines to resume marital relations."

Whatever the statutory requirements may be as to the period of desertion, the rule is that an offer of reconciliation which comes after the desertion comes too late to affect the desertion. Thus the Court below, bound by these broad legal criteria, was in error in holding that the wife's refusal to return to her husband some twenty-five years after he had left her for another woman overcame the effect of his desertion as the reason for her living apart from him.

Moreover, an offer of reconciliation is ineffective if there is continuing misconduct by the party offering reconciliation.¹¹ In view of the findings by the Deputy Commissioner that the relations between the husband and his bigamous wife continued after her move to New Jersey, and the absence of any finding that the husband's adulterous relationship had been terminated, the Court below was in error, on this ground alone, in giving weight to the husband's query.

Inasmuch as the Court of Appeals was mistaken both as to the fact of the endeavor and as to the law of its effect, the alternative ground upon which it sustained the judgment of the District Court below gives way. It cannot therefore be relied upon to deny the petitioner her relief.

Conclusion

The grounds upon which the petitioner's eligibility for compensation has been challenged are twofold. First, is that the statute permits inquiry into the wife's conduct after she has been deserted by her husband in order to

¹¹ 27 Corpus juris Secundum 578.

terminate the desertion. The desertion, viewed either as a fact in the marital relation or as a legal concept, is a continuum. There is neither language nor purpose in the statute to justify the use of conduct subsequent to the desertion, whether it be a bigamous marriage or refusal to resume the marriage, to negate the effect of the desertion in the marriage. The petitioner's status as a wife living apart from her husband by reason of his desertion at the time of his death, therefore, cannot be denied under the Longshoremen's and Harbor Workers Act.

The second ground for challenge is even less substantial. It is that the husband endeavored to have his wife return to him and that she refused. On the facts, the Court of Appeals was in error as to the endeavor. Even if the fact of the endeavor be conceded, the legal criteria for determining the existence of desertion, upon which the Court must rely, bar the use of offers made after the desertion has been consummated.

Petitioner submits for the foregoing reasons that the decision below was in error and should be reversed.

Respectfully submitted,

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